Wisconsin
Department of Commerce

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Scott McCallum, Governor
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October 15, 2002

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Laura LaMuth [Johnson]
Milw. County Env. Svcs. Div
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Mari Samaris-White
Administrative Law Judge
Department of Commerce
P.O. Box 7970
Madison, WI 53707-7970

Re: Laura LaMuth [Johnson], Milw. County Env. Svcs. Div v. Dept. of Commerce, Hearing #98-176
PECFA #53208-1824-49
Site: Washington Park Service Yard, 1849 N 40th St, Milwaukee

Dear Parties and Hearing Office:

Attached is a copy of the proposed and final decisions in the above captioned matter. Please note that the decision contains a description of the procedures for filing a rehearing request or petition for judicial - review and a list of the parties in interest.

Sincerely,

Linda K. Esser

Linda K. Esser
Executive Staff Assistant

Encl.

STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of:

Laura LaMuth (Johnson),
Milwaukee County Env. Services Division
Site: Washington Park Service Yard
1849 North 40th Street
Milwaukee, Wisconsin

PECFA Claim: #53208-1824-49

Hearing #98-176

Final Decision

Preliminary Recitals

Pursuant to a Petition for Hearing filed on or about November 3, 1998, under § 101.02 (6) (e) Wis. Stats., and § Comm/ILHR 47.53 Wis. Adm. Code, to review a decision of the Wisconsin Department of Commerce (Department) dated October 22, 1998, a hearing was commenced on January 23, 2001 at Madison, Wisconsin. A Proposed Hearing Officer Decision was issued on April 22, 2002 and the parties were provided a period of twenty (20) days to file objections.

The Issue for determination is:

Whether the Department's Decision dated October 22, 1998, denying the Appellant's PECFA reimbursement claim in the amount of $63,831.84 for groundwater system treatment remedial action costs was correct.

There appeared in this matter the following persons:

PARTIES IN INTEREST:

Laura LaMuth (Johnson)
Milwaukee County Env. Services Division
Site: Washington Park Service Yard
1849 North 40th Street
Milwaukee, Wisconsin

By: John E. Schapekahm, Esq.
Principal Assistant Corporation Counsel
Milwaukee County
901 North 9th Street
Milwaukee, Wisconsin 53233

PECFA Claim #53208-1824-49

Wisconsin Department of Commerce
PECFA Bureau
201 W. Washington Avenue
P.O. Box 7838
Madison, Wisconsin 53707-7838

By: Kristiane Randal, Esq.
Assistant Legal Counsel
Wisconsin Department of Commerce
201 W. Washington Avenue, Room 322A
P.O. Box 7838
Madison, Wisconsin 53707-7838

The authority to issue a Final Decision in this matter has been delegated to the undersigned by the Secretary of the Department pursuant to § 560.02 (3) Wis. Stats.

The matter now being ready for Final Decision I, Martha Kerner, Executive Assistant of the Department, hereby issue the following:

FINDINGS OF FACT

The Findings of Fact in the Proposed Hearing Officer Decision cited above are hereby adopted for purposes of this Final Decision.

CONCLUSIONS OF LAW

The Conclusions of Law in the Proposed Hearing Officer Decision cited above are hereby adopted for purposes of this Final Decision.

DISCUSSION

The Discussion in the Proposed Hearing Officer Decision cited above is hereby adopted for purposes of this Final Decision.

FINAL DECISION

The Proposed Hearing Officer Decision cited above is hereby adopted as the Final Decision of the Department.

PECFA Claim #53208-1824-49

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under § 227.48 Wis. Stats. If you believe this decision is based on a mistake in the facts or law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Office of Legal Counsel, Wisconsin Department of Commerce. 201 West Washington Avenue, P.O. Box 7970, Madison, Wisconsin 53707-7970.

Send a copy of your request for a new hearing to all the other parties named in this Final Decision as "PARTIES IN INTEREST".

Your request must explain what mistake you believe the hearing examiner made and why it is important of you must describe your new evidence and tell why you did not have it available at the hearing in this matter. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request for a new hearing will be denied.

Your request for a new hearing must be received by the Department's Office of Legal Counsel no late than twenty (20) days after the mailing date of this Final Decision as indicated below. Late requests cannot be reviewed or granted. The process for asking for a new hearing is set out in § 227.49 Wis. Stats.

Petition For Judicial Review

Petitions for judicial review must be filed not more than thirty (30) days after the mailing of this Final Decision as indicated below (or thirty (30) days after the denial of a denial of a request for a rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Office of the Secretary, Wisconsin Department of Commerce, 201 West Washington Avenue, P.O. Box 7970, Madison, Wisconsin 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" or each party's attorney of record. The process for judicial review is described in § 227.53 Wis. Stats.

PECFA Claim #53208-1824-49

Dated: 10/15/02

Martha Kerner
Executive Assistant
Wisconsin Department of Commerce
201 West Washington Avenue
P.O. Box 7970
Madison, Wisconsin 53707-7970

Copies to:

Above identified "PARTIES IN INTEREST", or their legal counsel if represented.

Laura Pleasants
PECFA Coordinator
Division of Environmental and Regulatory Services
Wisconsin Department of Commerce
201 West Washington Avenue
P. O. Box 7970
Madison, Wisconsin 53707-7970

Date Mailed: _____

Mailed By: _____

STATE OF WISCONSIN
DEPARTMENT OF COMMERCE

IN THE MATTER OF: The claim for reimbursement under the PECFA Program by

MADISON HEARING OFFICE
1801 Aberg Ave., Suite A
P.O. Box 7975
Madison, WI 53707-7975
Telephone: (608)242-4818
Fax: (608)242-4813

LAURA LA MUTH,
MILWAUKEE COUNTY ENVIRONMENTAL SERVICES DIVISION, Appellants,

VS.

WISCONSIN DEPARTMENT OF COMMERCE, Respondent.

Hearing Number: 98-176
Re: PECFA Claim No. 53208-1824-49

PROPOSED DECISION OF THE STATE HEARING OFFICER

NOTICE OF RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, Order and Opinion in the above-captioned matter. *Any party aggrieved by the proposed decision must file written objections to the Findings of Fact, Conclusions of Law and Order within twenty (20) days from the date this Proposed Decision is mailed.* It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Madison Hearing Office, P.O. Box 7975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to Martha Kerner, Executive Assistant to the Secretary of the Wisconsin Department of Commerce, who is the individual designated to make the *FINAL* Decision of the Department of Commerce in this matter.

STATE HEARING OFFICER: **DATED AND MAILED:**

Robert C. Junceau, Administrative Law Judge April 22, 2002

****

MAILED TO:

Appellants' Attorney:

John E. Schapekahm
Principal Assistant Corporation Counsel
Milwaukee County
901 North 9th Street
Milwaukee, WI 5233-1425

Respondent's Attorney:

Kristiane Randal
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(608) 267-4433

STATE OF WISCONSIN
BEFORE THE
DEPARTMENT OF COMMERCE

LAURA LA MUTH,
MILWAUKEE COUNTY ENVIRONMENTAL
SERVICES DIVISION,
Appellants,

vs. **Hearing No. 98-176**

WISCONSIN DEPARTMENT OF COMMERCE
Respondent.

PECFA CLAIM # 53208-1824-49

PROPOSED DECISION

This is a timely appeal by the appellants pursuant to section 101.02 (6) (e), and Chapter ILHR 47.51 (1) of the Wisconsin Administrative Code of a Wisconsin Department of Commerce order dated October 22, 1998 denying appellants' claim for reimbursement under the Petroleum Environmental Cleanup Fund Act (PECFA) program in the amount of $63,831.84.

Evidentiary hearing was held on November 28, 29, 30, 2000, and January 24, 2001 before Robert C. Junceau, Administrative Law Judge, Department of Workforce Development, acting as a State Hearing Officer for the Department of Commerce. The issues were argued in post-hearing briefs.

The appellants appeared by Attorney John E. Schapekahm, Principal Assistant Corporation Counsel, Milwaukee County, Wisconsin.

The respondent appeared by Attorney Kristiane Randal, Assistant Legal Counsel, Wisconsin Department of Commerce, Madison, Wisconsin.

Parties in interest are:

Milwaukee County Environmental Services Division
Laura La Muth
Milwaukee, WI 5320

Environmental Regulatory Services Division
Wisconsin Department of Commerce
201 East Washington Avenue
P.O. Box 7969
Madison, WI 53707-7969

PROPOSED FINDINGS OF FACT

(Reference below to "the appellant" refers to Milwaukee County Environmental Services Division, unless otherwise indicated. Ms. LaMuth is included as an appellant as the individual responsible for matters related to the claim filing, in her official capacity as successor to Robert Knighten.)

1. The PECFA (Petroleum Environmental Cleanup Fund Act) program is currently part of the respondent division in the Wisconsin Department of Commerce. During the years in which the issues presented in this appeal arose, however, it was housed in the Wisconsin Department of Industry, Labor & Human Relations (now Department of Workforce development).

2. The appellant owns the reimbursement claim site involved in this claim -- the Washington Park Service Yard ("service yard") 1849 N. 40th St., Milwaukee, WI.

3. This appeal arises concerning respondent's denial dated October 22, 1998 of appellant's claim for reimbursement of expenses totaling $63,831.84 for costs incurred in the design and installation of a ground-water extraction and treatment system on the service yard site.

4. For purposes of compliance with environmental laws pertaining to petroleum contamination, the appellant created a petroleum tank management plan approved by the Wisconsin Department of Natural Resources ("DNR") for various tank sites it owned, including the above site. The plan's purpose was to proceed to remediation of various sites on a prioritized basis generally dependent on the level of contamination.

5. During 1990 and 1991, the appellant utilized a consultant, Foth & Van Dyke to work on a number of the tank sites for the county under its plan. The order of priority in addressing the tanks was based on the comparative risk the tanks posed to the environment. At the time the service yard site was not considered a priority site.

6. On August 17, 1990 Foth & Van Dyke oversaw the removal of a 2,000-gallon steel, single-wall underground storage tank ("UST") on the service yard site. This tank was numbered P-33 in appellant's tank inventory. It had been used for 24 years to store unleaded gasoline. The appellant contracted with Petroleum Equipment Inc. to carry out the tank removal. At the time of removal the tank had observably leaked into the surrounding soil. Foth & Van Dyke took soil samples at three locations: the north and south ends of the tank, and under the pump for the tank.

7. May 1989 site assessment guidelines provided by the DNR stated as follows:

> Because site assessments require taking soil samples for laboratory analysis, the best (and least expensive) approach is to conduct the site assessment during the tank closure when the soil is exposed. If the tank is being abandoned in place, it will be necessary to take samples by using a soil drilling rig prior to the completion of the abandonment-in-place. [Ex. B, p. 79].

8. Laboratory analysis of these August 1990 samples performed in September of 1990 showed concentrations of total petroleum hydrocarbons ranging from 1,220 parts per million ("ppm") to in excess of 4,510 ppm. The sample from the south end of the tank also showed "BTEX" (an acronym for four gasoline-related compounds) contamination of 365 pp. DNR was notified of the release of petroleum contamination on the site.

9. By letter dated October 5, 1990 the Wisconsin Department of Natural Resources ("DNR") notified appellant that contamination was discovered on the site in August 1990 and that appellant was a responsible party at this site. It stated that, based on the site-specific information provided, this case had been assigned to the "Low Priority Rank" group. The low priority was determined based on the (mis)perception that soil contamination appeared to have a limited potential for impacting groundwater. The letter further directed the appellant, as responsible party, among other things, to "[c]onduct an investigation to determine the extent of soil and underground contamination" and to "[r]emediate all of the environmental impacts caused by this situation." The letter also directed appellant within 30 days of receiving the letter to provide its DNR project manager with the date the remedial investigation will begin.

10. Under date of January 3, 1991, Foth & Van Dyke prepared for the appellant a three-page tank closure assessment report concerning the service yard site, with attachments. The report's stated purpose was "to evaluate whether soil and/or groundwater contamination was evident" within the UST excavation. It reported the tank removal and excavation, monitoring of ionizable organic compounds in the field, soil sampling, and sample analysis for contamination, stating specific results. It noted that staining was evidenced on excavated soils beneath the tank and that the excavated tank appeared to be in poor condition, with numerous holes. It also stated that "[i]onizable organic compound field readings and analytical results indicate that petroleum contaminant levels are well in excess of the WDNR 10 ppm action limit for TPH and BETX." Attachments included a sample location map, soil sample chain of custody and analysis request forms, and laboratory analysis results from September of 1990. The report concluded that petroleum contamination of soil above the DNR action levels appeared to be present, but that the contamination was limited in extent. The report recommended that the site be overexcavated and the contaminated soil landfilled.

11. Foth & Van Dyke also prepared 1990 and 1991 annual summaries for appellant describing its activities during the preceding year on all the county sites it managed. The 1990 summary, dated February, 1991, provided a history of the county's UST Management Program. The report identified then currently planned UST remediation activities that were potentially reimbursable under the Wisconsin Petroleum Environmental Cleanup Fund (PECFA) program. The report listed the Washington Park site as one where an old tank was removed, and a new

one installed. The report noted that upon removal of the various tanks, environmental site assessments, including sampling activities required by the DNR were conducted, with a minimum of three total TPH samples taken from each tank excavation, and one sample collected from every 20 feet of tank piping. The report noted that, based on field readings and analytical results, soil and/or groundwater contamination in excess of current DNR guidelines or enforcement standards existed at a number of locations, including Washington Park. The report failed to identify any remedial measures that may have been taken in 1990, but described a proposed three-year remediation plan submitted to the DNR for approval. The report acknowledged that a number of remedial options were available for contaminated sites, but that prior to designing and implementing these alternative remedial options, the DNR requires the site to be "characterized" to determine the constituents, concentration, and limits of contamination. The report listed the Washington Park tank site as having projected costs for 1993 of $13,300 for Foth & Van Dyke activities associated with overexcavation and $80,000 for subcontractor costs associated with overexcavation activities allocated to 1992.

12. The 1991 annual summary submitted to appellant in April 1992 provided a summary of activities completed in 1991 and projected activities for future years. Nothing was done on the Washington Park site during 1991.

13. On May 3, 1993 the appellant contracted with Hydro-Search, Inc. ("HSI") to be its remediation consultant on, among other sites, the service yard site.

14. On July 27, 1993 HSI submitted to appellant its "Remedial Investigation Work Plan for Washington Park." The plan included a determination of remedial alternatives, including costs. Three alternatives with estimated costs were discussed. The plan recommended excavation with land filling. As an appendix to the plan, the plan included Foth & Van Dyke's January 3, 1991 tank closure assessment report.

15. On or about September 20, 1993 HSI sent to the southeast district DNR office in Milwaukee a "Remedial Alternatives Comparison for Washington Park ... per WDILHR requirements." It discussed alternatives similarly to the July 27, 1993 plan document, but provided greater detail concerning estimated costs.

16. On October 27, 1993, HSI supervised the overexcavation of impacted soil at the site. It collected samples for field screening and laboratory analysis. 420 cubic yards of soil was removed. Ten soil samples were collected from the sidewalls and bottom of the excavation. Subsequent laboratory analysis of the soils revealed significant contamination in the walls and bottom of the excavation. During the excavation highly contaminated groundwater was encountered in a "sand lens" found at the base of the excavation. A trench and sump was installed below the base of the excavation to extract perched ground water.

17. Analysis of a ground water sample in January 1994 revealed unacceptably high concentrations of contaminants. HSI concluded that the contamination was the result of migration of contaminants from the UST removed in 1990 and that ground water remediation was required.

18. Under date of May 4, 1994 HSI prepared for appellant a remedial action implementation plan for the site. It described the results of the October 1993 excavation and testing and stated that two soil bore holes would be installed in May of 1994 and may be completed as monitor wells if water is present. Soil samples and ground water samples were to be collected at that time to determine the extent of impacts to soil and ground water. It described a possible ground water remediation system.

19. On June 24, 1994, HSI undertook three soil borings at the site and installed an additional monitoring well on October 14, 1994 to evaluate the eastern extent of ground-water impacts. As of December 2, 1995, the monitoring wells had not yet been surveyed and therefore the ground-water flow direction was not verified, though HSI assumed the flow was to the east.

20. On September 5, 1995 the appellant through HSI filed a claim with respondent for reimbursement for the site investigation phase and remedial action for the soil only. This is generally referred to in the record as the "first claim." However, it bears the same claim number as the "second claim"—the claim at issue in this decision. The determination for each claim was labeled "partial." Subsequently, the respondent reviewed and approved the first claim in the amount of $39,778.20 on or about June 11, 1996.

21. On March 29, 1996 HSI submitted to the respondent a remedial alternatives letter seeking approval to use a groundwater pump-and-treat system using activated carbon to treat the water.

22. On or about April 8, 1996 HSI submitted to the DNR design plans and specifications for ground-water extraction and treatment system for the site. On May 10, 1996, the DNR conditionally approved the plans, without any assurance of PECFA eligibility for the remediation system.

23. On July 8, 1996, Nancy S. Kochis, a hydrogeologist employed by respondent, denied approval of the HSI remedial action plan because it "does not contain certain required information." Daniel Morgan of HSI belatedly replied with a letter of September 2, 1997 in which he asserted that "the initial work plan submitted to WDNR for investigation/remediation was dated July 27, 1992." In fact, however, the attached face sheet of the plan containing that date misstated the year, which should have been 1993. Morgan also asserted that the amount for installation of the groundwater treatment system is below the $80,000 limit for which respondent's approval was required and that, if the installation costs were known when the March 29, 1996 remedial alternatives letter was written, no response was required from respondent (even if the site was not pre-ILHR 47). Subsequently, Kochis told Morgan on September 7, 1997 that she reviewed the reply and that the site is classified as a pre-ILHR 47 site. Therefore, her disapproval letter was unnecessary (because approval was not required for a pre-ILHR 47 site). Inferentially, her September 7 statements were in reliance on the representation in Morgan's September 2 reply letter.

24. Actual construction of the groundwater treatment system in question began on April 8, 1996, after the appellant submitted its remedial action plan to the respondent on March 29, 1996, but before HSI's receipt of the DNR's conditional approval, HSI's receipt of a response from

respondent, and respondent's decision on the first remediation claim for the excavation of soils. The construction was completed on July 1, 1996. Apparently, the treatment system has been operating since November 7, 1996.

25. Under date of January 3, 1997 appellant through HSI filed the claim for PECFA reimbursement in question. The claim was based on invoices dated from September 29, 1995 to September 10, 1996 incurred in the design and installation of the groundwater pump and treatment system.

26. On October 22, 1998 the respondent denied the second claim pertaining to groundwater pump and treatment costs in its entirety because that remedial alternative was not approved. Russell Haupt, a PECFA grant reviewer, audited the claim and denied all costs, stating that he believed the site falls under Wis. Admin. Code § ILHR-47. He cited the correct date on which the initial work plan was submitted, July 27, 1993, which was *after* the January 15, 1993 date applicable to pre-ILHR 47 claims. He also noted that the *total* claim including the soil removal (first claim-$39,778) and for installation of the groundwater treatment system (second claim-$63,831.84) was above the $80,000 limit, which thus required respondent's approval.

27. Under date of May 3, 1999, the appellant submitted through HSI a third claim for the service yard site in the amount of $61,028.71, covering costs for the pump-and-treat system operation, maintenance, and monitoring from December 1996 to October 1998. Respondent again denied reimbursement for all costs because the remedial alternative had not been approved. Respondent's grant reviewer on the third claim, Dean Mueller, did not believe that Foth & Van Dyke's tank closure assessment was the start of the appellant's investigation. However, he did believe that the remediation costs in the first claim were eligible because the remedial alternative of soil excavation was approved by the respondent.

28. In deciding not to submit a comparison of a minimum of three cost alternatives and a detailed cost estimate for the chosen alternative before undertaking the activities reflected in claim two, appellant did not rely on any actions or decisions by the respondent.

ISSUES

The initial issue for decision on appeal is whether the respondent's decision dated October 22, 1998, denying the appellant's PECFA reimbursement claim in the amount of $63,831.84 for groundwater system treatment remedial action costs was correct because this was a pre-Wis. Adm. Code § ILHR 47 site.

APPLICABLE LAW
Wisconsin Administrative Code Provisions

§ ILHR 47.015 (35) [f/k/a § ILHR 47.335 (4), eff. 3/1/94] states:

(35) "Site investigation" means the investigation of a petroleum product discharge to provide the information necessary to define the nature, degree and extent of a contamination and to allow a remedial action alternative to be selected.

§ ILHR 47.335 SITE INVESTIGATION AND REMEDIAL ACTION PLAN DEVELOPMENT CAP. (1) GENERAL. Site *investigations which have not been started as of January 15, 1993,* shall conform to this section.

* * *

(3) CONSIDERATION OF ALTERNATIVES. (a) The remedial action plan developed for the site shall include a consideration of at least 3 alternatives, one of which shall be passive bio-remediation with long-term monitoring. The consideration of alternatives shall include a basic comparison of costs and the recommended alternative shall have a detailed cost estimate. If passive bio-remediation with long-term monitoring is feasible but not the recommended alternative, a clear rationale shall be provided as to why this alternative is not acceptable. Costs of long-term monitoring, or operation and maintenance shall be included in the comparison of costs in considering the alternatives.

(b) If the consideration of the passive bio-remediation or monitoring alternative shall be excluded because of site characteristics, the alternative shall be replaced by consideration of another alternative. If an alternative is substituted for the passive bio-remediation or monitoring alternative, the reason for this change shall be documented in the analysis.

(c) 1. The comparison of alternatives shall be a concise document written so that the responsible party and the department may easily compare alternatives. Only alternatives which are reasonably expected to be approved by the DNR may be included in the comparison. The comparison of alternatives shall be submitted to both the DNR and the department if the selected alternative is greater than $80,000. The comparison submitted to the department shall not include the full remedial action plan, unless requested by the department.

* * *

(4) START OF INVESTIGATION. An investigation shall be considered started if, after confirmation of a contamination is obtained, additional soil borings, soil sampling or monitoring-well construction have begun. In addition, the work on the site shall have an element of continuity.

PROPOSED CONCLUSIONS OF LAW

1. The appellant is owner of a property covered by the remedial provisions of § 101.143, *Wis. Stats.*

2. The August 1990 soil samplings taken by Foth & Van Dyke constituted a site investigation started before January 15, 1993, within the meaning of § ILHR 47.015 (35) of the Wis. Adm. Code.

3. The site in question was pre-ILHR 47, within the meaning of Wis. Adm. Code § ILHR 47.335, above.

4. The respondent's decision denying the appellant's request for reimbursement under the PECFA program in the amount of $63,831.84 was incorrect, within the meaning of section 101.143 (4) (b) 15 of the Wisconsin Statutes and related administrative code provisions.

PROPOSED DECISION

The respondent's decision dated October 22, 1998 denying appellant's claim for PECFA reimbursement is reversed.

Dated: April 22, 2002

State Hearing Officer

Robert C. Junceau
Administrative Law Judge

PROPOSED OPINION

Section ILHR 47.335 (1) of the Wis. Adm. Code states requires site investigations that had not been started as of January 15, 1993 to conform to that section. The issue here is whether the site investigation of the service yard tank site had been started as of January 15, 1993. This opinion concludes that it had.

Section ILHR 47.335 (4) states that "an investigation shall be considered *started* if, *after confirmation of a contamination* is obtained, *additional* soil borings, *soil sampling* or monitoring-well construction have begun." It is undisputed between the parties that the activities referenced must have occurred before January 15, 1993 for the claim to be regarded as pre-ILHR 47.

Appellant relies on the Foth & Van Dyke activities on August 17, 1990 and thereafter as the start of the investigation. Respondent disagrees.

On August 17, 1990, in removing tank P-33 from the Washington Park service yard site, Foth & Van Dyke visually observed soil contamination. The soil was stained and the tank had numerous holes in it. At the same time, Foth & Van Dyke also took soil samples. The soil samples were analyzed in September of 1990, confirming contamination at specific levels. HSI subsequently explicitly relied on the analysis of these samples in proceeding with the soil remediation plan. In turn, this led to the discovery during remediation in October of 1993 of groundwater contamination. There is no question, based on this record, that the groundwater contamination was the result of leakage from tank P-33.

Wis. Adm. Code § ILHR 47.015 (35) defines a "site investigation" as including the following elements:

> -Investigation of a petroleum product discharge
>
> -To provide the information necessary to define the nature, degree and extent of a contamination
>
> -To allow a remedial action alternative to be selected.

The evidence clearly shows that Foth & Van Dyke's activities on August 17, 1990 during the tank excavation met these elements. The activities included investigation of a petroleum product discharge – unleaded gas from tank P-33. Soil samples taken showed the nature, degree and extent of a contamination. This allowed a remedial action alternative to be selected. Thus, those activities constituted a "site investigation."

Furthermore, nothing legally or professionally prohibited those activities from sufficing as a site investigation. May 1989 site assessment *guidelines* provided by the DNR advised that "the best (and least expensive) approach is to *conduct the site assessment during the tank closure when the soil is exposed.*" [Ex. B, p. 79] That is what was done here.

It is not necessary, as respondent implies, to determine the subjective intent of Foth & Van Dyke as to what they *thought* they were doing in August of 1990. These activities constituted a site investigation begun before January 15, 1993 under § ILHR 47.335 (1), above. Although follow-up was delayed due to prioritization as part of the appellant's management of remediation of multiple UST sites, there was continuity between that work and HSI's subsequent work.

This decision moots consideration of the appellant's alternative theories as to the right of reimbursement.